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MCKEE, VOORHEES & SEASE, P.L.C.			MELLER, MICHAEL V	
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DES MOINES, IA 50309-2721			1655	· · · · · ·
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# BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Application Number: 09/879,710

Filing Date: June 12, 2001 Appellant(s): BATES ET AL.

> Wendy Marsh For Appellant

**EXAMINER'S ANSWER** 

Art Unit: 1654

This is in response to the appeal brief filed 4/11/2005.

#### (1) Real Party in Interest

A statement identifying the real party in interest is contained in the brief.

#### (2) Related Appeals and Interferences

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

#### (3) Status of Claims

The statement of the status of the claims contained in the brief is correct.

#### (4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

### (5) Summary of Invention

The summary of invention contained in the brief is correct.

Application/Control Number: 09/879,710 Page 3

Art Unit: 1654

(6) Issues

The appellant's statement of the issues in the brief is correct.

(7) Grouping of Claims

The rejection of claims 2-8, 10 stand or fall together because appellant's brief does not include a statement that this grouping of claims does not stand or fall together and reasons in support thereof. See 37 CFR 1.192(c)(7).

(8) Claims Appealed

The copy of the appealed claims contained in the Appendix to the brief is correct.

(9) Prior Art of Record

4,772,591 Meisner 9-1988

3,892,852 Joullie et al. 7-1975

Chemical Abstracts Registry File Printout of S-methyl Cysteine, 2002.

(10) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 102

Art Unit: 1654

Claims 2, 3, 8 and 10 are rejected under 35 U.S.C. 102(b) as being anticipated by Meisner.

Meisner teaches that a composition containing among other ingredients, an antiinflammatory substance, specifically, S-methylcysteine is administered to a patient, see
abstract, col. 5, lines 3-27, col. 6, lines 6-8 and 57-67 and the claims. Even though the
composition is administered to the patient for a different reason in the reference, it
would have been inherent to the process of Meisner that nitric oxide synthesis is
inhibited since the steps of the processes (Meisner and the instant application) are the
same. All the process requires is that the S-methylcysteine is administered to a patient.

#### Claim Rejections - 35 USC § 103

Claims 2-8 and 10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Meisner taken with Joullie et al. and Chemical Abstracts Registry File Printout of Smethyl Cysteine.

Art Unit: 1654

Meisner teaches what is above. Meisner does not teach to inject the S-Methyl cysteine into a patient. Meisner also does not explicitly state that S-methylcysteine and S-methyl-L-cysteine are the same compound.

Joullie teaches that S-methyl cysteine is well known to be injected into an animal for therapeutic purposes, see column 10, lines 25-35, column 11, lines 30-45 and the claims.

Thus it would have been well within the purview of the skilled artisan to inject the S-methylcysteine composition of Meisner into a patient since as taught by Joullie it is well known to inject S-methyl cysteine for therapeutic purposes. Thus, it would have been well within the purview of the skilled artisan to inject the S-methyl cysteine since it is simply the choice of the artisan in an effort to optimize the desired results.

It is clear from the attached Chemical Abstracts Registry file print out that S-methylcysteine and S-methyl-L-cysteine are indeed the same compound.

## (11) Response to Argument

Appellants argue that Meisner teaches a method which uses a composition which contains four substances, namely ascorbic acid, a precursor or stimulant of epinephrine or nor-epinephrine production such as tyrosine or phenylalanine (amino

Art Unit: 1654

acids of which S-methyl cysteine is also an amino acid), calcium and a mild antiinflammatory substance which can be S-methylcysteine.

Appellant argues that with the limitation "consisting essentially of" that the claim is limited and does not read on Meisner. Fact is, when one turns to appellants own specification they also include in their composition to be used besides calcium, excipients, stabilizers, antioxidants (which ascorbic acid is one), flavoring, effervescent agents, and the like, see specification page 4, first full paragraph. Appellants never explained on the record how their method's composition did not contain elements which materially changed the fundamental characteristics of the invention only that Meisner contained other elements and therefore their claims were excluded by "consisting essentially of". Appellant was reminded that unless they can show that the additional elements in Meisner materially changed the fundamental characterisitics of their invention then the composition of Meisner and that of the claims was one and the same because Meisner and the appellant disclosed administering the same S-methyl cysteine composition to a patient and that the additives in Meisner and that of appellant were inconsequential absent evidence to the contrary which appellant never provided on the record. Appellant simply continued to reinterate that Meiser had more in it besides just S-methyl cysteine.

Appellant also argues that epinephrine or nor-epinephrine are well known vasconstricting agents but Meisner was administering a precursor or stimulant of epinephrine or nor-epinephrine production such as tyrosine or phenylalanine (amino

Art Unit: 1654

acids of which S-methyl cysteine is also an amino acid) not epinephrine or norepinephrine. Thus, the argument is without merit.

In the 35 USC 103 rejection, appellant argues again that epinephrine or norepinephrine are well known vasconstricting agents but Meisner was administering a
precursor or stimulant of epinephrine or nor-epinephrine production such as tyrosine or
phenylalanine (amino acids of which S-methyl cysteine is also an amino acid) not
epinephrine or nor-epinephrine. Thus, the argument is not understood. In fact these
vasconstricting agents could be amino acids which S-methylcysteine is. Thus, the
arguments is without merit.

It is also noted that the claims never require the patient to suffer from anything, thus the argument that the invention is aimed at avoiding the side effects of vasoconstrictors is without merit since anyone according to the claims can be administered this composition claimed no matter what their need is.

For the above reasons, it is believed that the rejections should be sustained.

Art Unit: 1654

Respectfully submitted,

Michael V. Meller Primary Examiner Art Unit 1654

MVM

June 20, 2005

Conferees:

**Bruce Campell** 

Ponnathapu Achutamurthy

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